Supreme Court, U.S.
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No. 03 481 SEP 27 2003

In The
Supreme Court of the United States

PETRÓLEO BRASILEIRO, S.A.,

Cross-Petitioner,

v.

STRATA HEIGHTS INTERNATIONAL CORPORATION,
STRATA ENERGY RESOURCES CORPORATION,
and HEIGHTS ENERGY CORPORATION,

Cross-Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED

1. Under the commercial activity exception in the Foreign Sovereign Immunities Act, does an American company's financial loss as a result of its unilateral decision to spend money in the United States to try to obtain contracts with a foreign entity constitute a "direct effect" in the United States so as to overcome foreign sovereign immunity?

2. Does the second clause of the commercial activity exception in the Foreign Sovereign Immunities Act require that "an act" be noncommercial such that a plaintiff's pleading only commercial acts is sufficient to satisfy the requirement and overcome foreign sovereign immunity, and what extent of activity is required to satisfy the second clause?

PARTIES TO THE PROCEEDING

Cross-Petitioner is Petróleo Brasileiro, S.A. ("Petrobrás"). The Federal Government of Brazil owns 55.71% of the shares of voting capital in Petrobrás. (R. at 392.) Sup. Ct. R. 29.6.

Cross-Respondents are Strata Heights International Corporation, Strata Energy Resources Corporation, and Heights Energy Corporation.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petróleo Brasileiro, S.A. ("Petrobrás") respectfully submits this Conditional Cross-Petition for Writ of Certiorari. Petrobrás seeks review of the decision by the United States Court of Appeals for the Fifth Circuit only if the Court grants the Petition for Writ of Certiorari filed by Strata Heights International Corporation, Strata Energy Resources Corporation, and Heights Energy Corporation (collectively "Strata") (No. 03-313). In that event, Petrobrás asks this Court also to grant this conditional cross-petition to consider the Fifth Circuit's ruling on whether Petrobrás is immune from suit under the Foreign Sovereign Immunities Act ("FSIA").

DECISIONS BELOW

The order by the United States Court of Appeals for the Fifth Circuit denying Strata's motion for panel rehearing is unreported and was reproduced as Appendix A to Strata's petition for writ of certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished and was reproduced as Appendix B to Strata's petition. The decision of the United States District Court for the Southern District of Texas was also unpublished and was reproduced as Appendix C to Strata's petition. The District Court adopted the Magistrate Judge's Memorandum and Recommendation, which was also unpublished and which was reproduced as Appendix D to Strata's petition.

JURISDICTION

Strata purported to invoke the jurisdiction of the United States District Court for the Southern District of Texas under 28 U.S.C. § 1330, 28 U.S.C. § 1605(a), and 28 U.S.C. § 1367. Petrobrás denied that jurisdiction could be premised on anything other than the Foreign Sovereign Immunities Act and argued that the District Court lacked jurisdiction over this lawsuit. Although the District Court concluded that Petrobrás was an agency or instrumentality of a foreign sovereign, the District Court rejected Petrobrás' FSIA defense because of the commercial activity exception. Petrobrás appealed to the Fifth Circuit under the collateral order doctrine on the issue of foreign sovereign immunity and also under 28 U.S.C. § 1292(b) to challenge the District Court's denial of Petrobrás' motion to dismiss for lack of personal jurisdiction, because of a forum selection clause, and for forum non conveniens. The Fifth Circuit's judgment was entered on April 28, 2003. The Fifth Circuit denied Strata's petition for panel rehearing on June 6, 2003.

Petrobrás submits this cross-petition for a writ of certiorari under Rule 12.5, pursuant to which certiorari is sought on these additional issues if and only if the Court grants certiorari on Strata's initial petition for a writ of certiorari. Strata's petition was docketed in this Court on August 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This cross-petition involves 28 U.S.C. § 1603(e), 28 U.S.C. § 1604, and 28 U.S.C. § 1605(a)(2) (set forth in Appendix E).

STATEMENT OF THE CASE

Summary of the Argument

To the extent the Court elects to hear the forum-selection-clause aspect of this case as requested by Strata, Petrobrás submits this case raises important questions about foreign sovereign immunity. More specifically, this case implicates a division among the United States Courts of Appeals over the interpretation and minimum requirements of the third clause of the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2), and important questions about the type and level of activity that American courts may deem sufficient under the second clause to abrogate the sovereign immunity of foreign entities in American courts. These two issues will have a profound impact upon both American foreign policy and foreign sovereigns' willingness to entertain opportunities for doing business with American entities.

Statement of the Facts

Petrobrás is the national oil company of Brazil. A majority of the shares of its voting capital is owned by the Federal Government of Brazil. (R. at 392.) This lawsuit arises out of extensive negotiations in Brazil between Strata and Petrobrás. The parties' dispute centers on an alleged contract negotiated in Brazil for development of

oilfields in Brazil. In the mid-1990s, the government of Brazil decided to allow foreign companies to come to Brazil in order to bid in Brazil to explore for oil in Brazil. (R. at 498, 314.) Scores of companies signed preliminary agreements to explore these opportunities and to conduct further negotiations with Petrobrás. (R. at 313, 227.)

Strata was among the companies exploring opportunities to develop oilfields in Brazil with Petrobrás. Strata's representatives traveled to Brazil repeatedly and signed the preliminary agreements (a Memorandum of Understanding and an Agreement for Technical Assessment), both of which contained or incorporated a forum selection clause requiring that all disputes be resolved by arbitration in Portuguese in Rio de Janeiro, Brazil. (R. at 116, 111.) The agreements also specified that Brazilian law would apply to any disputes. (R. at 116, 111.)

Petrobrás ultimately was unable to complete the transactions that Strata sought, in part because Brazilian law prohibited Petrobrás from going forward with the development of all of the subject properties. Under Brazilian regulations, Petrobrás had to surrender certain projects to the Agencia Nacional de Petrolio, the Brazilian regulatory agency. Strata and all of the other companies bidding for development projects knew that some of the fields would not be available for development, as another preliminary agreement had expressly so stated. (R. at 307.)

Every single scheduled negotiation between Petrobrás and Strata occurred in Brazil. (R. at 489-88.) Not once did any representative of Petrobrás ever come to the United States to deal with Strata. (R. at 489-88.) The only encounter between Petrobrás and Strata representatives in

the United States occurred when a Petrobrás director, who was not then directly involved in the negotiations with Strata, was in Houston, Texas, attending an unrelated industry conference. (R. at 489-88.) A representative of Strata approached him on a break during the conference, and they chatted briefly. Strata alleges that the Petrobrás director made statements about the legality of certain aspects of the parties' dealings in response to questions from the Strata representative. (R. at 226-24.) At the end of their conversation, the Petrobrás director told the Strata representative that, if he had any other questions, he should call the Petrobrás' director's secretary in Rio de Janeiro to make an appointment in Brazil. (R. at 489-88; R. at 286, 226-24.)

In the end, under Brazilian law, Petrobrás was unable to give Strata a competitive advantage as sought by Strata. Unlike many of the eighty other companies that were also attempting to consummate transactions with Petrobrás, Strata never submitted a bid during the open bid process, apparently because it did not receive the competitive advantage it requested. Instead, Strata brought this suit against Petrobrás. Although Strata eagerly sought to do business with the Brazilian oil company in Brazil over property rights in Brazil and even though Strata had expressly agreed to arbitrate disputes in Brazil, Strata chose to file suit in Federal Court in Texas.

Proceedings Below

Strata's suit in the United States District Court for the Southern District of Texas asserted numerous claims, fully half of which Strata brought under Brazilian law. (R.

at 75-67.) United States District Judge John D. Rainey referred the case to United States Magistrate Nancy Johnson for pretrial proceedings. Petrobrás moved to dismiss for lack of subject matter jurisdiction based on the Foreign Sovereign Immunities Act, lack of personal jurisdiction, a forum selection clause, and forum non conveniens. Magistrate Judge Johnson concluded that Petrobrás was an agency or instrumentality of a foreign state (R. at 477) but that Petrobrás was not entitled to foreign sovereign immunity because of the commercial activity exception to the FSIA. Magistrate Judge Johnson thus recommended that the District Court deny Petrobrás' motion to dismiss for lack of subject matter jurisdiction based on the FSIA and in all other respects. Petrobrás timely objected to Magistrate Judge Johnson's memorandum and recommendation. The District Court adopted Magistrate Judge Johnson's recommendation and denied Petrobrás' motion to dismiss.

Petrobrás timely appealed the District Court's determination on the FSIA issue under the collateral order doctrine. Judge Rainey also certified his ruling on the other three aspects of his order (personal jurisdiction, forum selection clause, and forum non conveniens) for interlocutory appeal under 28 U.S.C. § 1292(b). The Fifth Circuit then consolidated the two appeals. On April 28, 2003, the Fifth Circuit issued an opinion reversing the District Court on the forum selection clause issue and remanded the case for dismissal. At the same time, the Fifth Circuit affirmed the District Court's denial of Petrobrás' motion to dismiss for lack of subject matter jurisdiction because of the FSIA, for lack of personal jurisdiction, and for forum non conveniens. Strata sought panel

rehearing of the ruling on the forum selection clause. The Fifth Circuit denied that motion.

Strata then asked this Court to grant its petition for writ of certiorari to address the forum selection clause. Simultaneously with this conditional cross-petition, Petrobrás is filing a brief in opposition to Strata's petition for writ of certiorari. By this cross-petition, Petrobrás seeks review of the lower courts' rulings on foreign sovereign immunity, but only in the event that the Court grants review on the forum selection clause issue.

REASONS FOR GRANTING PETROBRÁS' CROSS-PETITION

This Court should grant Petrobrás' cross-petition for writ of certiorari because the lower courts' decisions interpreting the Foreign Sovereign Immunities Act present conflicts among the Courts of Appeals and raise important federal questions that require guidance from this Court.

The FSIA is a cornerstone of American foreign policy. It is the exclusive method of obtaining jurisdiction over a foreign sovereign. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). The FSIA generally exempts foreign sovereigns from the jurisdiction of United States courts. 28 U.S.C. § 1604. Congress has granted foreign sovereigns immunity not only from liability, but also from the burdens and costs of litigation. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation.").

One exception to the FSIA's general grant of immunity to foreign sovereigns and their agencies and instrumentalities is the commercial activity exception. That exception requires a jurisdictional nexus with the United States and provides three separate avenues for satisfying that requirement: "a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Strata argued that the second clause applied to its fraud and misrepresentation claims because of a brief conversation that occurred at an unrelated industry conference in Houston and that the third clause applied to its contract claims, and the Court of Appeals agreed.

1. The Courts of Appeals are divided over whether a plaintiff's mere financial loss in the United States can constitute a direct effect to satisfy the FSIA's commercial activity exception.

In *Weltover*, this Court provided lower courts with some guidance on the third clause of the commercial activity exception and the parameters of the direct effect test. The Court indicated that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Weltover*, 504 U.S. at 618. The Court further admonished the lower courts not to add "any unexpressed requirement" to the direct effect test, expressly disavowing any requirement that a direct effect be substantial or foreseeable. *Id.* Since *Weltover*, however, the lower courts

have continued to struggle with proper application of the direct effect test. *See, e.g., United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) ("[W]e must concede that we have struggled to identify objective standards that would aid in determining what does and does not qualify as a 'direct effect in the United States.' The phrase itself seems hopelessly ambiguous when applied to any particular transaction. The guideposts previously adopted by many courts – the requirement that a direct effect be both 'substantial' and 'foreseeable' – was [sic] expressly rejected by the Supreme Court in *Weltover*."). Commentators have also noted issues lingering after *Weltover* and the need for additional clarification by this Court. *See, e.g.*, George A. Davidson, *Jurisdiction Over Non-U.S. Defendants*, 771 PLI/Comm 31, 72-73 (Feb. 1998) ("*Weltover* left courts uncertain about how to apply the third clause of Section 1605(a)(2). Courts have varied in their application of the direct effects test.").[1]

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[1] *See also* Heidi L. Frostestad, Note, Voest-Alpine Trading v. Bank of China: *Can a Uniform Interpretation of a "Direct Effect" Be Attained under the Foreign Sovereign Immunities Act (FSIA) of 1976?*, 34 Val. U. L. Rev. 515, 529 (Summer 2000) ("Certainly, the Court's interpretation of the 'direct effect' exception under the FSIA as an 'immediate consequences' analysis confused the Circuits after its issuance and still confuses courts today."); Matthew Bensen, Comment, *The All New (International) "People's Court": The Future of the Direct Effect Clause After* Voest-Alpine Trading USA Corp. v. Bank of China, 83 Minn. L. Rev. 997, 1008 (April 1999) (noting that after *Weltover*, "[a]pplication of the direct effect clause in subsequent cases has proven to be varied and unpredictable"); Sarah K. Schano, Note, *The Scattered Remains of Sovereign Immunity for Foreign States After* Republic of Argentina v. Weltover, Inc. – *Due Process Protection or Nothing*, 27 Vand. J. Transnat'l L. 673, 705, 708-09 (Oct. 1994) (noting that *Weltover* "still leaves room for a variety of interpretations" and has "caused disagreement among lower courts" and that "conflicting results involving similar facts

(Continued on following page)

Further guidance by this Court, therefore, is needed: As set out below, there is a conflict among the Courts of Appeals as to whether a plaintiff's mere financial loss in the United States is sufficient to constitute a direct effect and overcome a foreign sovereign's immunity under the FSIA. The Court should grant Petrobrás' cross-petition to clarify this important issue and resolve the conflict among the Courts of Appeals. Sup. Ct. R. 10(a).

This case underscores the need for clarification on the direct effect test. The District Court in this case concluded that Petrobrás waived its foreign sovereign immunity as to Strata's contract claims under the third clause of 28 U.S.C. § 1605(a)(2). (R. at 469-68.) In doing so, it relied exclusively on Strata's allegedly suffering financial losses in the United States (by deciding to spend money in the United States in negotiating a contract in Brazil) to find subject matter jurisdiction on Plaintiffs' contract claims. (R. at 472-68.) The Fifth Circuit agreed, positing that Strata incurred "contract losses, in the form of reliance, expectancy, and restitution damages . . . and spent considerable sums and suffered opportunity costs because of [its] reliance, and that Strata performed valuable services which benefited Petrobrás and for which it has not been justly compensated." (Joint Appendix at 11a.) No matter how many ways the Fifth Circuit described it, that is nothing more than a mere financial loss. (*See also* Brief of

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will not be unusual"); *see also generally* David E. Gohlke, Comment, *Clearing the Air or Muddying the Waters? Defining "A Direct Effect in the United States" Under the Foreign Sovereign Immunities Act After* Republic of Argentina v. Weltover, 18 Hous. J. Int'l L. 261 (Fall 1995) (commenting on lack of guidance from *Weltover*).

Appellees at 48 (arguing that Strata "incurred financial losses in the United States due to Petrobrás' commercial activities in Brazil").)

A. The Courts of Appeals are divided over what constitutes a direct effect.

The Courts of Appeals are divided as to whether a mere financial loss in the United States constitutes a direct effect. The majority of circuits that have considered the issue have concluded that it does not. Specifically, the Second, Seventh, Ninth, Tenth, and D.C. Circuits have concluded that a plaintiff's mere financial loss is insufficient to satisfy the third clause's direct effect requirement. *See, e.g.*, *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993) ("[T]he fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception."); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 581-82 (7th Cir. 1989) ("The fact that an American corporation or individual has suffered financial injury due to the foreign state's actions may not be sufficient to establish FSIA jurisdiction unless the foreign state has performed some 'legally significant act' here.");[2] *Adler v. Fed. Republic of Nigeria*, 107 F.3d

[2] Even though *Rush-Presbyterian-St. Luke's Center* predates this Court's decision in *Weltover*, the Seventh Circuit appears to continue to adhere to that rule. *Week v. Cayman Islands*, 983 F.2d 1074, No. 91-2965, 1992 WL 372241, at *4 (7th Cir. Dec. 16, 1992) (unpublished disposition) (citing *Rush-Presbyterian-St. Luke's Center* for proposition that "legally significant act" is required for direct effect and that "[f]inancial injury to an American corporation is insufficient to constitute direct effect").

720, 726-27 (9th Cir. 1997) (concluding that "mere financial loss by a person – individual or corporate – in the U.S. is not, in itself, sufficient to constitute a 'direct effect' "); *United World Trade*, 33 F.3d at 1239 (concluding that an American citizen's suffering financial loss is insufficient to constitute direct effect); *Soudavar v. Islamic Republic of Iran*, No. 02-7129, 2003 WL 21401768, at *1 (D.C. Cir. June 12, 2003) (not selected for publication) ("[A] mere financial loss by a resident of the United States does not constitute a 'direct effect' in the United States."). The circuits that reject mere financial loss as a basis for showing a direct effect generally require that there be some "legally significant act" for the direct effect test to be satisfied. *See, e.g.*, *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) ("This test requires that the conduct having a direct effect in the United States be legally significant conduct in order for the commercial activity exception to apply.").

The Fifth and Sixth Circuits have reached the opposite conclusion. The Fifth Circuit has rejected the "legally significant acts" test and concluded that a Plaintiff's mere financial loss in the United States does constitute a direct effect to satisfy the third clause of the commercial activity exception. *See, e.g.*, *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 893 (5th Cir. 1998) ("[A] financial loss incurred in the United States by an American plaintiff may constitute a direct effect that supports jurisdiction under the third clause of the commercial activity exception."); *see also* Joint Appendix at 21a ("Nothing in the statute . . . precludes application of the third clause to losses in the form of expended capital."). The Sixth Circuit has sided with the Fifth. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 817-18 (6th Cir. 2002).

Noting the division among the other Courts of Appeals on this issue, the Sixth Circuit considered but expressly declined to adopt the "legally significant acts" test. *Id.*[3]

There is, therefore, a significant conflict of authority over what constitutes a direct effect under the FSIA. *See* Frostestad, *supra*, 34 Val. U. L. Rev. at 552 (observing that *Voest-Alpine* caused a circuit split); Davidson, *supra*, 771 PLI/Comm at 73 ("After *Weltover*, courts have disagreed over whether mere financial loss in the United States will meet the direct effects test.").[4]

B. Resolution of this issue by this Court is necessary to avoid undercutting the FSIA and expanding the universe of cases that American courts will be required to hear.

The conflict among the Courts of Appeals, moreover, concerns much more than a minor detail. Rather, as clearly articulated by the courts that have rejected a mere financial loss as a basis for satisfying the direct effect test and overcoming foreign sovereign immunity, allowing a

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[3] Because of these inconsistencies in the Fifth Circuit, Petrobrás submitted to the Fifth Circuit that while the facts of this case did not satisfy the direct effect test in place in the Fifth Circuit, in the event that the Fifth Circuit disagreed, the Fifth Circuit should revisit the issue *en banc*. (Joint Appendix at 11a; Brief of Appellant at 35-37.) The Fifth Circuit declined. (Joint Appendix at 11a.)

[4] This conflict, moreover, is not simply a matter of the circuits' taking divergent paths. To the contrary, they directly have joined issue on this dispute and are directly at loggerheads with one another. *E.g.*, *Keller*, 277 F.3d at 817-18 (discussing *Antares Aircraft*, *Adler*, *United World Trade*, and *Voest-Alpine* in "declin[ing] to adopt the 'legally significant acts' test").

mere financial loss to satisfy the third clause of the commercial activity exception will undercut the FSIA and greatly expand the universe of cases that American courts are required to hear. For instance, the Second Circuit has articulated these policy concerns:

> If a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states. Many commercial disputes, like the present one, can be pled as the torts of conversion or fraud and would, if appellant is correct, result in litigation concerning events with no connection with the United States other than the citizenship or place of incorporation of the plaintiff.

Antares Aircraft, 999 F.2d at 36. This Court has also recognized Congress' concern in enacting the FSIA that "our courts [might be] turned into small 'international courts of claims[,]' . . . open . . . to all comers to litigate any dispute which any private party might have with a foreign state anywhere in the world." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 490 (1983).

Likewise, the Tenth Circuit has explained that allowing a plaintiff's mere financial loss to satisfy the direct effect test "would give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen claims to have suffered a loss from the act of a foreign state." *United World Trade*, 33 F.3d at 1239 ("We think that the language of § 1605(a)(2) limiting jurisdiction to cases where there is a '*direct* effect' in the United States makes it unlikely that this was

Congress' intent."). Commentators have also recognized the problem of widely opening the doors to American courts by reading the third clause too broadly. *See* 15 James Wm. Moore, et al., *Moore's Federal Practice* § 104.12[2][c] (3d ed. 2001) ("[A] 'direct effect' does not include, standing alone, the suffering of financial hardship in the United States from events that took place abroad. Otherwise, the commercial activity exception would, in large part, eviscerate the FSIA's provision of immunity for foreign states."). If an American plaintiff is involved, the exception almost invariably will swallow the rule.

In short, if a plaintiff's suffering a financial loss in America by choosing to spend its own money is sufficient to constitute a direct effect, then almost anything is. That significantly expands the scope of the third prong of the commercial activity exception and thus the universe of cases that United States federal courts will be required to hear. Included in that universe are disputes that are almost entirely foreign in character, except that the plaintiff happens to be American and happens to have decided to spend money in America. *See Dominican Energy Ltd. Inc. v. Dominican Republic*, 903 F. Supp. 1507, 1514 (M.D. Fla. 1995) ("[T]he only reason that [plaintiff's] financial losses bear any relationship to the United States is the purely fortuitous fact that [plaintiff] is a United States corporation."). Virtually every plaintiff will be able to show that it incurred *some* expense that it can call a financial loss and thus a direct effect, whether it be telephone calls, due diligence, putting together a business proposal, having employees prepare for a hoped-for project, or other expenses naturally incurred in evaluating and considering business proposals.

This case squarely presents the Court with the opportunity to resolve this conflict among the circuit courts. Petrobrás is unquestionably a foreign agency or instrumentality; the transactions at issue were entirely Brazilian and were to take place in Brazil; every single scheduled negotiation with Strata occurred in Brazil (R. at 489-88); no Petrobrás representative ever came to the United States to deal with Strata (*id.*); the parties' agreements required dispute resolution by arbitration in Brazil; and it is undisputed that every final agreement of the sort Strata sought to consummate required dispute resolution outside the United States. In other words, except for the plaintiff being American, this case has everything to do with Brazil and nothing to do with the United States. Despite all that and despite its best efforts to keep this dispute in Brazil, Petrobrás wound up in an American court because Strata chose to spend money in America. Those expenditures were part and parcel of Strata's trying to obtain contracts with Petrobrás and, like any company trying to do business with another company, choosing to spend money to further their negotiations. The "losses" that Strata incurred were wholly unilateral. Rejecting the Fifth Circuit's test (that a mere financial loss is sufficient) will yield a different result in this case and clarify the rule for future cases.

Regardless of which side the Court comes down on, this important question requires resolution. As it stands now, it is unclear to foreign entities considering doing business with American companies whether they unwittingly may undo the FSIA's protections simply by

negotiating with an American company.[5] *See* Bensen, *supra*, 83 Minn. L. Rev. at 1020-21 (observing that after *Weltover* "the international market has been left without a guide as to what extent parties to transactions can rely on exceptions to immunity under the FSIA"). Worse yet, it may be that foreign entities are declining even to consider doing business with American entities – here or abroad – for fear that despite their best efforts, they could be hauled into an American court. *See id.* at 998-99, 1022 (observing that *Voest-Alpine* "may ultimately cause foreign governments to avoid transactions with American businesses" and "may act as a disincentive for foreign sovereigns who do not wish to be dragged into U.S. courts").[6]

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[5] Petrobrás respectfully disagrees with the Fifth Circuit's conclusion that this Court's "requirement that a direct effect under the third clause be nontrivial sufficiently limits the scope of foreign sovereign immunity [sic], for it precludes a few phone calls or letters from the United States from constituting a direct effect." (Joint Appendix at 12a.) To the contrary, even if a plaintiff spends nontrivial amounts of money and suffers nontrivial losses, there still is nothing more than a financial loss in the United States. The nontrivial requirement does little to ameliorate the concerns articulated by the other circuits.

[6] This conflict over proper interpretation of the direct effect test also encourages plaintiffs to forum shop to make sure they bring suit in a circuit that holds that mere financial losses can constitute a direct effect.

2. This Court should resolve confusion over whether "an act" under the second clause of the commercial activity exception must be noncommercial and clarify what is required to satisfy this clause.

The Court should also grant Petrobrás' cross-petition to clarify whether "an act" under the second clause of the commercial activity exception must be noncommercial, as the Fifth Circuit holds, and to provide courts and litigants guidance on the level of activity required for this clause of the commercial activity exception to apply.

A. The Fifth Circuit's construction of "an act" under the second clause of the commercial activity exception presents an important, unsettled federal question and conflicts with this Court's construction of "an act" under the third clause of the commercial activity exception.

The Fifth Circuit has consistently held that the second clause of the commercial activity exception applies only to noncommercial acts in the United States. *See, e.g.*, *Voest-Alpine*, 142 F.3d at 892 n.5 ("Because the first clause permits jurisdiction based on 'commercial' acts in the United States, the second clause is generally understood to apply to noncommercial acts in the United States that relate to commercial acts abroad."); *Byrd v. Corporacion Forestal y Industrial de Olancho, S.A.*, 182 F.3d 380, 390 (5th Cir. 1999) ("Because appellees pointed to an exclusively commercial action in the United States they have not proven this exception applies."). The Fifth Circuit reasoned that the *first* clause of the commercial activity exception applies to commercial acts ("upon a commercial

activity carried on in the United States by the foreign state") such that the second clause must require a non-commercial act.

In reliance on those holdings, Petrobrás argued to the lower courts that because the only acts upon which Strata relied to invoke this clause plainly were commercial, this prong of the commercial activity exception could not apply. (Brief of Appellant at 20-21.) The Fifth Circuit, however, did not directly pass upon this issue in its opinion, instead determining that "Strata's fraud and misrepresentation claims are based either upon a commercial act in the United States or a noncommercial act in the United States, and thus fall within either the first or second clause of the commercial activity exception." (Joint Appendix at 10a, 21a.) Strata did not argue on appeal that the first clause was satisfied. The Fifth Circuit recognized that the District Court did not consider whether the first clause was satisfied but concluded that it could affirm on this basis if it is supported by the record. (Joint Appendix at 10a.) Petrobrás submits that the Fifth Circuit erred in this regard. A "commercial activity carried on in the United States" must have "substantial contact with the United States." 28 U.S.C. § 1603(e); *see also Soudavar v. Islamic Republic of Iran*, 186 F.3d 671, 674 (5th Cir. 1999); *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 389 n.11 (5th Cir. 1991). Neither the Fifth Circuit nor the District Court ever considered whether the acts alleged by Strata to have occurred in the United States satisfied that high standard. The Fifth Circuit thus refused to consider whether the acts had to be commercial or noncommercial under the second clause and then ignored the "substantial contact" requirement applicable to the first clause. It is

thus altogether unclear what standard the Fifth Circuit applied, let alone that any standard was satisfied.

This issue warrants the Court's attention as it presents two compelling reasons for granting certiorari. First, the rule that the second clause applies only to noncommercial acts plainly persists in the Fifth Circuit, but it is entirely unclear what it means. Indeed, in its opinion in this case, the Fifth Circuit noted "that under this court's current construction of the second clause of § 1605(a)(2), which requires a suit to be based upon noncommercial activity, the clause has little if any content, particularly if tortious activities driven by a profit motive are considered commercial." (Joint Appendix at 21a.) This case highlights the problem with that lack of clarity, as Petrobrás reasonably believed the exception should not apply based on the facts as pleaded by Strata. While the Fifth Circuit declined to revisit this issue, the parties fully briefed it. (*E.g.*, Brief of Appellees at 32-35.) This Court should settle this question. *See* Sup. Ct. R. 10(c) ("a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court"). As of now, the scope of the exception is understandably confusing to litigants and foreign entities considering doing business with American companies.

Second, as Strata argued to the Fifth Circuit, the Fifth Circuit's reasoning appears to be in tension with this Court's construction in *Weltover* of the same phrase ("*an act* outside the territory of the United States . . . that . . . causes a direct effect in the United States") in the *third* clause, which the Court did not limit to noncommercial acts. (Brief of Appellees at 34.) As such, the Fifth Circuit arguably has decided an important federal question in a

way that conflicts with a relevant decision by this Court. *See* Sup. Ct. R. 10(c).

B. The Court should clarify what minimum level of activity is required to satisfy the second clause of the commercial activity exception.

The Court should also consider the degree of activity that a foreign sovereign must engage in to satisfy the second clause. In this case, the lower courts concluded that the second clause of the commercial activity exception was satisfied so as to overcome foreign sovereign immunity on Strata's fraud claims based solely on the conversation at the unrelated industry conference in Houston. All of the negotiations, meetings, and discussions between the parties occurred in Brazil for a project to take place in Brazil. Strata's own factual recitations concede that, other than one conversation at an unrelated industry seminar, all negotiations, meetings, and discussions between the parties occurred in Brazil for a project to take place in Brazil. (R. at 80-75.) Despite this, the District Court relied exclusively on the one brief conversation initiated by Strata during a break at an industry seminar in Houston to find subject matter jurisdiction on Strata's fraud and misrepresentation claims. Petrobrás maintains that this means that by its own unilateral actions, a plaintiff can simply foist jurisdiction on a foreign entity provided it can "tag" it in the United States.

Regardless of whether the "act" under the second clause must be noncommercial, this second clause requires clarification from this Court. Even accepting Strata's factual assertions as true, a single, brief conversation initiated by an American entity on a break at an unrelated

industry seminar should not be held to satisfy this clause, particularly where all of the parties' extensive negotiations have occurred in a foreign country. The conversation is too isolated, unrelated, and immaterial to all of the parties' dealings in Brazil, and it was hardly taken in connection with commercial activity elsewhere.

Under the Fifth Circuit's interpretation of this clause, however, foreign sovereign immunity is undone even though the foreign sovereign took hardly any voluntary, relevant act in the United States. It simply makes no sense to unravel the FSIA over an encounter so incidental to the extensive activities in the very foreign country in which the American entity sought to do business. For many of the same reasons Petrobrás identified above in connection with the direct effect test as to why greater protection for foreign sovereigns is needed, this issue also requires clarification so that international entities will be able to predict the levels of protection to which they are entitled under the FSIA. Until the Court provides such clarification, and hopefully stronger standards than the Fifth Circuit employs, foreign entities are left without any meaningful protection and guidance on this important issue.

Petrobrás therefore asks the Court to grant its cross-petition to consider this important federal question, as well.

CONCLUSION

Petrobrás respectfully submits that the Court should deny Strata's petition for writ of certiorari, but, in the event the Court grants Strata's petition, Petrobrás asks

the Court to grant Petrobrás' cross-petition and consider the FSIA issues.

Respectfully submitted,

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APPENDIX E

§ 1603. Definitions

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1603(e).

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a

commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).